F. M. S. REPORTS.

[COURT OF APPEAL]

POYSER, C.J., McELWAINE, C.J. (S.S.) & TERRELL, J.A. (MALAYA).

February 28, 1940.

PUBLIC PROSECUTOR

v.

MOHAMED SALLEH BIN BITAM.

[PERAK CRIMINAL APPEAL No. 17 of 1939]

PUBLIC PROSECUTOR

v.

BACHITA SINGH & 2 OTHERS.

[PERAK CRIMINAL APPEAL No. 20 of 1939]

Penal Code, S.225A — negligently allowing a prisoner to escape—degree of negligence required to be established to support conviction.

The same high degree of negligence which must be proved to support a conviction under Section 304A of the Penal Code must be proved to establish a conviction under any of the other sections of the Penal Code which make 'negligent acts' a criminal offence.

Cases referred to:—

(1) *Andrews v. Director of Public Prosecutions,* (1937) A.C. 576.
(2) *Chow Keok v. Public Prosecutor,* (1940) 9 M.L.J. 103.
(3) *Commissioner of Stamps v. Oei Tjong Suan,* (1933) 2 M.L.J. 107; (1933) A.C. 389.
(4) *Daglish v. Barton,* (1900) 1 Q.B. 284.
(5) *Haines v. Guthrie,* 13 Q.B.D. 818.
(6) *Haji Adam v. Selma,* 1 F.M.S.L.R. 136.
(7) *Khoo Keat Lock v. Haji Yusop,* (1929) S.S.L.R. 231.
(8) *King Emperor v. Gupta,* (1932) A.I.R. All. 18.
(9) *Lai Tin v. Public Prosecutor,* (1939) M.L.J. 248.
(10) *Meyer v. Meyer,* (1927) S.S.L.R. 17.
(11) *Mills v. Jennings,* 13 Ch.D. 648.
(12) *Mohamed Syedol Ariffin v. Yeoh Ooi Gark,* (1916) 2 A.C. 575 at p. 580; 1 M.C. 165.
(13) *Raphiah v. Haji Arshad,* 6 F.M.S.L.R. 64.
(14) *Rex v. Bateman,*
(15) *Reg. v. Burns,* (1886) 16 Cox C.C. 355.
(16) *Rex v. Ng Pin* (1928) S.S.L.R. 81.
(17) *Satish Chandra Chakravarti v. Ram Doyal De,* (1920) I.L.R. 48 Calc. 388.
(18) *Wallace-Johnson v. The King,* (1940) W.N. 5.
(19) *Wynne-Finch v. Chattor,* (1903) 2 Ch.D. 475 at p. 485.

CRIMINAL APPEAL by the Public Prosecutor.

Hay, Deputy Public Prosecutor, for the Public Prosecutor. My Lords, this is a case of negligently allowing a prisoner to escape, the charge being under Section 225A of the Penal Code. It is not necessary to go in detail into the facts of the case. The prisoner was a mental patient. He was being conveyed with two other prisoners by train. Some of the guards went away and left the prisoners with an insufficient number of people to look after them and one of them made a bolt. The learned Magistrate who tried the case found that the defendants were negligent and presumably—he did not say so in so many words—but presumably he found that the negligence of the defendants was the cause of the escape of the prisoner; but he found that although this dereliction of duty amounted to negligence, it did not amount to criminal negligence, having regard to the definition of "negligence" recently pronounced by the Court of Appeal. The case he referred to is that of *Cheow Keok*[2]. I think I need not enter any further into the facts than to say that these defendants were guilty of negligence. Their negligence was the cause of the prisoner's escape but that negligence did not amount to the high degree of negligence required for conviction under Section 304A of the Penal Code. The Magistrate says:—"The only one of these defendants who could conceivably have been convicted was the 3rd defendant, Abdul Wahab bin Chik, P. C. 3980, but with regard to him it must be borne in mind that he is a young man new to the Police force and that he was placed in a very difficult position by the departure of the two other defendants."

C.J.F.M.S. They all went off and left this man in charge?

Hay, Yes. I do not know why the attendants were not charged, but I am really concerned with the position consequent on the learned Magistrate's finding of fact and in the light of the decision in *Cheow Keok v. Public Prosecutor*[2]. I think, My Lord, that for the purpose of this case, we can take the finding of fact in paragraphs 1 and 2 of the Grounds of Decision.

C.J.F.M.S. That the degree of negligence was insufficient to justify conviction under this Section?

D.P.P. That is so. The Magistrate said that the defendants were telling the truth, that they made a clean breast of what amounted to grave dereliction but which did not amount to criminal negligence having regard to the definition of "negligence" recently enunciated by the Court of Appeal.

C.J.F.M.S. You are contending that it is not necessary to establish a high degree of negligence?

D.P.P. That is right. My position now, My Lord, is this: here we have a case where negligence has been found: it has not the sufficiently high degree of negligence to satisfy the standard set by the judgment in *P.P.* v. *Cheow Keok*[2]. My Lord, I will not affront Your Lordships' reason or run the risk of Your Lordships' reproving me for my lack of it by suggesting to Your Lordships that in a code such as the Penal Code we can read a word like "negligence" to mean one thing in one Section and another thing in another Section. I should not venture to stand here before Your Lordships and suggest that. To my mind the only possibility of getting Your Lordships to allow this appeal is to ask you to reconsider the decision in *Cheow Keok*.

C.J.F.M.S. Do you realise that in this court there are two of the judges who gave that decision. Do you suggest we can review our own decision?

D.P.P. My Lord, I do not see why you should not review your own decision. There is a case where Mr. Justice Darling reversed his own decision. [To a Question by the C.J.S.S.] That was the fortune telling case.

C.J.F.M.S. Are we not bound by our own decisions?

D.P.P. I say no, My Lord.

C.J.F.M.S. Is not the Court of Criminal Appeal bound by its own decisions?

D.P.P. My Lord, there is another Court of Appeal immediately above it.

C.J.S.S. Lord Hewart himself has said that the Court of Criminal Appeal is bound by its own decisions.

D.P.P. On the other hand, the English Court of Appeal has at least on two occasions overruled its own decision.

C.J.F.M.S. Assuming that it is desirable to overrule our decision in *Cheow Keok*[2] a similar interpretation was placed on the section in India and Ceylon. You are asking to place a different interpretation to that?

D.P.P. I have not got so far as yet. With regard to that I have a very recent decision from the Gold Coast.

C.J.F.M.S. The Gold Coast does not use the Indian Penal Code.

D.P.P. The Privy Council's decision is that the Criminal Code of the Gold Coast "must be construed in its application to the facts of the present case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland." I will go into that at length with all the other authorities when I get to that stage of my argument. The first question is whether Your Lordships are satisfied that you can, if necessary, reconsider *Cheow Keok*. I will present Your Lordships with these authorities. The first, My Lords, is *Wynne-Finch* v. *Chaytor*[19]. Judgment having been stated, the finding of the Court goes on as follows:—

> "There is, however, a decision of the Court of Appeal in **Daglish v. Barton**[4] which is inconsistent with this view. The Court on that occasion consisted of the late A. L. Smith, L.J. and Vaughan Williams, L.J. the latter of whom expressed the doubt as to the true meaning of the sub-section, and now agrees with the present judgment. With the greatest respect, we are unable to agree with **Daglish v. Barton**[4], and think that it ought not to be followed; and it is, therefore overruled."

C.J.S.S. A Court of three judges overruled two judges.

D.P.P. The second one, My Lords: *Mills* v. *Jennings*[11]:—

> "As a rule, this Court ought to treat the decisions of the Court of Appeal in Chancery as binding authorities but we are at liberty not to do so where there is a sufficient reason for overruling them"

and decides to overrule it.

There is I believe a recent *dictum* by Sir W. Greene that it may be done, that the Court of Appeal can overrule its own decisions. This first case I cited—*Wynne-Finch* v. *Chaytor*[19]—was referred to by Lord Justice Greer not long ago apparently with approval.

C.J.F.M.S. I do not think that it has ever been laid down as to the number of judges for this to be done.

D.P.P. Of course, My Lord, not very long ago Your Lordship's predecessor, Sir Roger Hall in 1938 overruled a decision of 1925. Sir Roger Hall was sitting as a single judge. Now, My Lord, to come to the local authorities. The first one I will cite is *Khoo Keat Lock* v. *Haji Yusop*[7].

> "In view of these authorities and others to the same effect I think it must be admitted that this Court may in exceptional circumstances differ from its own decision. But it is clear that this very extreme step should be taken with the greatest reluctance and only when it cannot be avoided. I do not know how far the decision in **Tan Joo Kwang** has been acted on, but it is a recent case and it would therefore seem that no great objection lies on that score."

I submit that is a very valuable statement, My Lord, because it suggests a test which we can apply—how long a decision has stood. Another, I think, very sound remark follows:—

> "It has also been suggested that our final Court of Appeal is so distant, and the expense and time involved in resort to it so great, that the comity should be less strict here than in England."

That, I submit, is a point which deserves consideration.

C.J.F.M.S. What about the F.M.S. Case?

C.J.S.S. There was a case in Kuala Lumpur in which Counsel for appellant admitted this court was bound by its own decision.

D.P.P. The submission of counsel, I do not think, makes law—submissions or admissions of counsel cannot make law for Your Lordships. It is a matter which your Lordships must decide, and I offer Your Lordships these authorities.

C.J.S.S. I understood that the Court of Appeal in the F.M.S. is bound by the Court of Appeal's previous decision.

D.P.P. I am coming to the F.M.S. one shortly. I want to take this other case first. The next one is *Meyer* v. *Meyer*[10]. The passage I am relying on is this:—

> "The jurisprudential question whether this Court is absolutely bound by its own previous decisions has also been argued. On this I am still of the opinion expressed in the case cited by appellant, **Khoo Keat Lock v. Haji Yusop**[7].
>
> The other side of the question appears in a recent decision of the F.M.S. Court of Appeal, where the Court doubted the correctness of a previous decision, but refused to interfere with it."

However, My Lord, in spite of that decision of the F.M.S. Court of Appeal, the Court here still preferred the old opinion. My Lord, here is the F.M.S. case: it is *Raphiah* v. *Haji Arshad*[13] and it deals with the question of whether or not there is a right of appeal. It is very interesting, My Lord, because when it is examined I think it will be as much in my favour as against it. The passage I am particularly relying on is on page 68:—

> "We have then the position that ever since 1896 the law regulating the appellate powers of the Courts has laid down that there is an appeal to the highest local court except where the judgment or order 'is expressly declared to be final'."

Then it goes on to consider how far that applies to the matter in question—the last paragraph but one:—

> "But unfortunately, the matter does not rest there. There does not seem to be any previous decision on Section 49 or its predecessors, but in **Haji Adam v. Selma,**[6] it was held by a strong Court consisting of Sir T. Braddell, C.J.C., Woodward and Edmonds, J.C. that there were no rights of appeal under Section 38 of the Land Enactment from the Court of a Judicial Commissioner to the Court of Appeal."

This case was decided in 1913—13 years before this decision:—

> "This case was decided in 1913 when the laws in force were the Courts Enactment, 1905, and the Land Enactment, 1911. The report is a mere note of the decision, but some reasons must have been given by the Court at the time. The reporter adds that 'a similar decision was given by the Court of Appeal in Selangor Civil Suit 16/97'."

My Lords, there you have a case where the Court refused to overrule a decision which had stood for 29 years, and the fact that the Court of Appeal refused to overrule its decision in that case does not, in my submission, mean that it cannot ever do such a thing: it means that that eminently was not the case to do so.

C.J.F.M.S. Section 304A: has it ever been directed that a high degree of negligence is necessary?

D.P.P. I have no record of that.

C.J.F.M.S. This is the first time that this point has been raised. You are asking the Court to reverse a practice which has existed for a great many years.

D.P.P. My Lord, I submit that unless we have any record we cannot assume that this practice has subsisted.

C.J.F.M.S. It is common knowledge that judges have always directed juries to the high degree of negligence necessary.

D.P.P. There are no juries in the F.M.S.

C.J.S.S. .....In a case like this in which proof of negligence was required, it would be impressed by the judges in summing up to assessors.

D.P.P. For Section 304A there would be no assessors.

C.J.S.S. In cases of causing death by negligence Judges have always directed themselves in Singapore Assizes to that effect.

D.P.P. If Your Lordships will allow me to continue, I will submit my points. This is not a trivial matter. It is a very important matter and the position is that if the law remains as it is left by the decision in *Cheow Keok*[2], the administration of the law would become extremely difficult.

C.J.F.M.S. More difficult than in the past?

D.P.P. Far more. I cannot pour out the whole of my arguments before Your Lordships in a few minutes. I want to put my arguments step by step before Your Lordships. If Your Lordships will allow me to do so, I will do it as quickly as I can manage it. I have here a copy of *Cheow Keok*[2]: as I read this judgment, it rests in the main upon the assumption that Section 304A of the Penal Code is an attempt to codify the offence designated in English Law of manslaughter by negligence. My Lord, that is exactly what the Privy Council has repeatedly told us that we must not do. We must not interpret this Code as if it is intended to codify some other system of law. My Lord, with utmost respect and submission I am going to submit to Your Lordship that this judgment was given *per incuriam,* principally because of a proposition stated on page 8. It says:—

> "Mr. Draper referred us to two Indian cases. Of these, in **King Emperor v. Gupta**[8], it was held, in reference to offence under the Salt Act, that English principles of Common Law cannot be engrafted upon the Indian Acts. This case, however, has no application, as the Salt Act is not, as section 304A is, a codification of English Common Law."

But My Lord, does not that amount to saying that this rule does not apply because we have already agreed to break it? That is exactly what the Privy Council has repeatedly told us not to do.

C.J.F.M.S. What? *D.P.P.* To construe any code as a codification of the English Law. C.J.F.M.S. What standard of negligence are you going to take?

D.P.P. I will deal with that point later. I should like to cite two authorities. The first is *Mohamed Syedol Ariffin* v. *Yeoh Ooi Gark*[12]:—

> "The courts below, have however, declined to accept this principle. They proceed upon two grounds. In the first place they think that the rules with regard to hearsay evidence, adopted in the English case of **Haines v. Guthrie**[5] should be followed in the Straits Settlements, and that that rule is not varied by the clause just cited from the Evidence Ordinance. And in the second place they hold that the illustration given in the statute does not in fact illustrate the section. On the first point the view of their Lordships is that the rule and principle of the Colony must be accepted as it is found in its own Evidence Ordinance, and that the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect",

and it has to be varied if we are going to give the word "negligence" a different meaning in one section from what we give it in the others.

> "The learned Sercombe-Smith, J. put the matter thus: 'I think that it is safer to construe s. 32, (5), and the illustrations on English lines than to extend the English law of evidence'."

Missing out 2 lines:—

> "The Board does not think that such a method of construction is safe or is warranted, and they cannot agree with the view suggested, the true principle being, in their opinion, that above stated."

The second one, My Lord, refers to construing a local statute in the light of the corresponding English statute. It is not exactly on the point because here we have a question of reading the English Common Law, but it is very similar: *The Commissioner of Stamps, S.S.* v. *Oei Tjong Swan*[3].

App. J. There are a number of decisions the other way.

D.P.P. This is 1933 Appeal Cases, page 389. It says:—

> "The difficulty in which the learned Judges find themselves in accounting for the terms of s. 73 sub-ss. 2 and 3, consistently with their decision is entirely occasioned by their approach to the problem of construction which the case presents. Instead of first considering the terms of the Ordinance itself, having at once entered upon an elaborate comparison of its provisions with those of the (Imperial) Finance Act of 1894 proceeded to draw inferences from the variations between the Ordinance with those of the Imperial statute. This is a perilous course to adopt and one which certainly does not commend itself to their Lordships."

My Lord, I have not yet had time to read this report myself—*Wallace-Johnson* v. *The King*[18]. It appears in the Weekly Notes, January, 1940, on page 5:—

> "The appellant was tried upon an information containing two counts charging him with offences against s. 330 of the Criminal Code of the Gold Coast Colony. The first count charged him with unlawfully publishing a seditious writing of and concerning the Government of the Gold Coast contrary to s. 330, sub-s. 2 (b), of the Criminal Code. The second count

charged him with unlawfully having in his possession documents containing seditious writing of and concerning the Government contrary to s. 330, sub-s. 2 (e) of the Code.

"Any person who (b) prints or publishes by any such act as is specified in Title 18 any seditious words or writing; or (e) being found in possession of any newspaper, book, or document or any part thereof or extract therefrom containing seditious words or writing, does not prove to the satisfaction of the Court that at the time he was found in such possession he did not know the nature of its contents; shall be liable to certain penalties.

"By sub-s. 8 of s. 326: 'a seditious intention' is an intention—(1) to bring into hatred or contempt.... the Government of the Gold Coast as by law established; 'Seditious words' are words expressive of a seditious intention.

"At the trial a plea of not guilty was entered, the defence being that the article was not seditious. There was no evidence of any outbreak of violence as a result of the article.

"The trial judge (Petrides, C.J. of the Gold Coast), sitting with 3 assessors (two of whom were of the opinion that the appellant was not guilty), held that the appellant was guilty on both counts, and sentenced him to pay a fine of 50 l. on the first count, and in default of payment within 14 days to be imprisoned for three months. No penalty was inflicted on the second count.

"An appeal by the appellant to the West African Court of appeal was dismissed. The Court held that the words complained of were obviously seditious, and that under each count all the elements going to make up the offence had been duly proved.

"On the application for special leave to appeal to His Majesty in Council it was stated that the case was of great importance as it raised a question as to the interpretation of the sedition ordinances in the colonies.

"The Judicial Committee of the Privy Council dismissed the appeal.

"Viscount Caldecote L.C., in delivering the judgment, said that the case for the appellant was that the prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention. The foundation for those submissions was sought in the summing up by Cave, J. in **Reg. v. Burns and Others**(15). Reference was also made to a number of cases on the law of sedition in English and Scottish Courts, which, it was said, supported the statement of the law by Cave, J.

"It was in the Criminal Code of the Gold Coast Colony, however, and not in English or Scottish cases that the law of sedition for the Colony was to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of s. 330 suggested that it was intended to contain as far as possible a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of the present case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland."

I understand, My Lord, that fairly recently most Colonies, I believe, have been asked to add certain provisions with regard to sedition, in which case, there might be every excuse for thinking that the object was to codify the law of England, and what this case shows is that when we interpret, we have got to interpret this Code as it stands and not read anything into it.

C.J.S.S. *Mens rea* is necessary under the Penal Code do we not have to refer to English decisions on *Mens Rea* to interpret the Penal Code?

D.P.P. I do not know, My Lord.

I think the *fons et origo* of this decision is Dr. Gour who is responsible for the remark that 304A is an attempt to codify the English Code of manslaughter. I will just examine the logic of that contention. I will refer Your Lordship to the Encyclopaedia of the General Acts and Codes of India. I submit this is citable. It is edited by Sir Tej Bahadur Sapru.

App. J. You are trying to establish that negligence has a different meaning in criminal matters to civil matters.

D.P.P. What I am now trying to do is to get away from this idea that 304A or any other part is an attempt to codify the English law. I want to get away from that and then start to interpret it on its own.

App. J. Then you say "negligence" in criminal law merely means an omission, in which case it is better to amend the Code to say that a person who does an act shall be deemed to be negligent. You are trying to put the onus on the judges.

C.J.F.M.S. By what standard do you say that the negligence of a person accused under section 304A must be judged?

D.P.P. I say, My Lord, that his negligence must be judged by the standard to be found in the Code.

C.J.S.S. What is that?

D.P.P. That, My Lord, is Section 80 of the Penal Code which says:—

> "Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution."

That of course ordinarily where the act itself constituted a crime—that would constitute an exception which would have to be proved by the defence but in this case the negligence itself constitutes a crime.

App. J. Every act of negligence must be criminal?

D.P.P. Yes.

App. J. There is plenty of authority to say that section 304A must be construed as we have construed it. Is there any authority to the contrary?

D.P.P. My Lord, I do not know, but it has been said by very high authority that the clearer the thing is, the harder it is to find authority for it.

C.J.S.S. You are asking us to go back on the decisions of the last 40 years.

D.P.P. I do not think that there is any other authority to say that 304A must be construed as if it is a codification of the English law.

C.J.F.M.S. But what the framers of the Code set out to do was to codify English Law was it not?

D.P.P. That is just the reason why I want to cite this work. Firstly, I want to read to Your Lordships an extract from the Report of the Commissioners on the Draft Penal Code and in case Your Lordships consider or doubt that I have any right to cite such a report I will show Your Lordships the authority for referring to this report, and that is in *Satish Chandra Chakravarti* v. *Ram Doyal De*[17]. The learned Chief Justice said that what the Commissioners set out to do was to codify the English law. It is in order to combat that proposition that I want to cite it. My case stands without it. I say we must throw aside everything else and take our stand by the Code.

D.P.P. I have got the All India Reporter, on page 6:—

> "To begin with an examination of the previous state of the law on the point, is to attack the problem on the wrong end; and it is a grave error to force upon the plain language of the section an interpretation, which the words will not bear, on the assumption of a supposed policy on the part of the Legislature not to depart from the rules of the English Law on the subject. In the present instance, however, a reference to the history of the Indian Penal Code, not only does not support the theory of such a policy, but shows clearly an indication on the part of the Legislature to deviate in many respects from the rules of the English Law on this particular topic. This is manifest from an analysis of Note R appended to the Draft of the Indian Penal Code, prepared by the Indian Law Commissioners (Macaulay, Macleod, Anderson and Millet) and submitted to the Governor-General in Council on the 14th October 1837. The Commissioners not only did not faithfully adhere to the rules of the English Common Law but in some respects, framed provisions which are at variance therewith, as also with the French Code and the Code of Lousiana."

All I want Your Lordship to do is to look at the same passage on which the Court looked down on this occasion.

C.J.F.M.S. It is based on the English Common Law?

D.P.P. The Commissioners say the direct opposite. Section 304A according to Gour was in the original draft. They left it out and later put it in. I ask Your Lordships to look at the very passage which the Court in this case of *Satish Chandra Chakravarti*[17] referred to. What the Commissioners say is this, after describing the prevailing state of the Criminal Law in India: "In these circumstances forms part of any of those systems". I submit that the Commissioners entirely disclaimed that they have attempted to codify the English Common Law. They definitely said it is not suitable. My Lord, if further arguments are required on that point, a very slight examination of the provisions of the Code will show that it makes no attempt whatever to codify the English Law. Compare the offence of theft with the offence of larceny. They are totally different offences—they differ materially. In England, My Lords, there is an offence which is larceny by bailee: in our law it may be criminal misappropriation or criminal breach of trust. Again, My Lord, compare the Penal Code offence of cheating with the English offence of larceny by trick and false pretences. There is no single offence in English Law which corresponds with cheating. Most cases of cheating would be either larceny by trick or false pretences, but no offence to correspond with cheating.

C.J.F.M.S. Then to act without proper caution is a criminal offence?

D.P.P. That is rather a jump. I have not said that.

C.J.F.M.S. That is what you are leading up to.

D.P.P. What I am trying to establish at present is to get entirely away from the English Law and construe the Code as we find it. Take the section of the Penal Code which makes it an offence to endanger life by doing an act in a rash and negligent manner. Section 336 has nothing corresponding to it at all in English law. My Lord, here we have the statement of the Commissioners.

C.J.S.S. Section 336 is not a very happy section for you to refer to. It speaks of doing anything so rashly or negligently.

D.P.P. My Lord, Section 304A also contains the word "rash" and that creates another difficulty.

C.J.F.M.S. Are you asking that this appeal should be heard by five judges. If that is what you want a formal application should be made.

D.P.P. I make no such application now. I want Your Lordships to reconsider in the light of these authorities and in the light of this recent Gold Coast case. My Lord this statement that I have shown Your Lordship—The Commissioners said they entirely disclaimed any idea of their trying to codify the English Law. They said that English Law is not suitable and what they have set out to do is to set up a criminal code for India. Dr. Gour is not a very sound authority to rely upon. Your Lordships will remember when Murison C. J. had to dissent very strongly from an authority laid down by Dr. Gour on a very important point. It is *Rex* v. *Ng Pin*[16].

App. J. You want us to read Section 225A (a) (ii) to mean that any person legally bound to keep any person suffers him to escape from confinement shall be punished?

D.P.P. That is not my suggestion at all.

App. J. Why? If so let his attention be distracted would not that be negligence?

D.P.P. It might be the result of an inevitable accident.

C.J.F.M.S. It might be a case of rescue.

D.P.P. The man might be overcome with faintness or something might happen to distract his attention inevitably.

C.J.S.S. Will it be negligence if he allows himself to be distracted?

D.P.P. All I want to do is to free ourselves from the necessity of having to find the very high degree of negligence that is required in England for manslaughter.

C.J.F.M.S. I think it is really a waste of time. It is all very interesting, but assuming that for the moment we have the power to go back on our own judgment I as a member of the Court which gave that judgment have no intention of doing so.....

D.P.P. The Legal Adviser had the intention of coming up here and arguing this case himself. At the last moment he found that he was unable to do so and has asked me to do it. He has instructed me as to the arguments that he would use and asked me to put them before Your Lordships. I submit that Your Lordships might as well hear me to the end. I won't be very much longer. I don't see how a tribunal half way through can make up its mind that it will not take a certain decision.

C.J.F.M.S. We have no power to stop you. You are entitled to go on. We only wish to indicate that it is only a waste of time.

D.P.P. I will ask Your Lordships to allow me to make my remaining points. They are not very many. First of all, we have in this section the words "rash" or "negligent". "Rash" must mean something different from "negligent", and if "negligent" is to mean the very high degree of negligence required for manslaughter, what is the meaning of "rash"?

With regard to this *dictum* of Dr. Gour, I submit that there is no such offence as manslaughter by negligence. There is the felony of manslaughter and there are various ways of committing it, one is to cause death by a high degree of negligence.

C.J.F.M.S. That is what they set out to codify.

D.P.P. There is another important ingredient of manslaughter. The victim must die within a year and a day. If they wanted to codify English law why should they omit that ingredient? And I would point out that the punishment for manslaughter is anything up to 20 years' penal servitude, whereas here the punishment is limited to 2 years.

C.J.S.S. But the court never gave more than 2 years for manslaughter by negligence. You know the Penal Code was re-enacted in the Revised Edition? In re-enacting the same words the Legislature must be taken to have ratified all these existing decisions upon it.

D.P.P. If Your Lordship is referring to the Indian decisions, I do not think the legislature of this country can be taken as ratifying any Indian decision.

C.J.F.M.S. They are entitled to respect though not binding.

D.P.P. Certainly not binding in our Courts. What I am attacking, My Lord, is the proposition that the high degree of negligence which is laid down in *Andrews*[1] is necessary here. I refer to the report in Appeal Cases, 1937—the proposition laid down in *Andrews* is that a very high degree of negligence is necessary to establish the charge of manslaughter, and there are two very strong reasons given for that rule in English Common Law, two very strong reasons which have no application here at all. The first is historical and the second is statutory. As to the historical reason, I refer to page 581:—

> "From the early days when any homicide involved penalty the law has gradually evolved

'through successive differentiations and interpretations' until it recognises murder on the one hand, based mainly, though not exclusively on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intention to kill but with the presence of an element of 'unlawfulness' which is the elusive factor."

There, His Lordship was dealing with the question of manslaughter as a whole, not a separate offence of manslaughter by negligence. At the bottom of 581:—

"After all, manslaughter is a felony and was capital, and men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertance. The stricter view became apparent in prosecutions of medical men or men who professed medical or surgical skill for manslaughter by reason of negligence."

and he cited *Williamson and Bateman*. My Lord, that is a very illuminating resumé of the history of the law. The common law requires a very high degree of negligence for a conviction for felony but that does not apply to 304A the maximum punishment for which is 2 years. The second special reason is a statutory one. That is that Section 34 of the Road Traffic Act has laid down that on an indictment for manslaughter a man may be convicted of dangerous driving, although the negligence is not of such a degree as would amount to manslaughter. There, My Lord, the Legislature has definitely laid down two different standards. That provision, again, does not appear in our law—the provision saying that a man can be convicted of dangerous driving although not guilty of 304A does not appear in our law.

App. J. He could be charged in the alternative in our law?

D.P.P. He could, but could he be convicted of one if he were not of the other?

C.J.F.M.S. If it appeared that he was negligent but that the negligence was not the cause of death could he not be acquitted of 304A and convicted of negligent driving?

D.P.P. My question is whether he is guilty of negligence under one and if not under the other.

C.J.S.S. In the Women and Girls' Protection Enactment, you have special provisions where persons proved to have acted in certain ways may be convicted of offences which require certain intention. The Legislature could have legislated on these lines in the Penal Code had it thought fit.

D.P.P. (To C.J.F.M.S.). That would be a case where the facts turned out to be slightly different—not quite a case of different standards of negligence. Again, on page 584, Lord Aitken says:—

"I entertain no doubt that the statutory offence of dangerous driving may be committed though the negligence is not of such a degree as would amount to manslaughter if death ensued."

Our offences are all statutory, My Lord,—every one of them. There is another point I will submit to Your Lordships:—336, the section which has no counterpart whatever in English Law. How are we going to interpret negligence there? Under the Road Traffic Enactment, if a man is charged under 25(2):—"If any person drives a motor vehicle on a road negligently he shall be guilty of an offence against this Enactment". My Lord, are we to interpret "negligence" there in the same way as "negligence" under the Penal Code? If so, is "negligently" worse than "dangerously"? We are dealing with the position that will arise if this criterion of negligence stands. The matter of the degree of negligence was considered sufficiently important or sufficiently unsettled for the case of *Andrews*[1] to be put up to the House of Lords. So presumably the law was not so completely settled before that time. Suppose a man is charged under 304A and it was decided that there was no negligence: can he be convicted under 25(2), of driving negligently?

App. J. You think that "negligently" there must bear the same meaning as in the Penal Code?

D.P.P. I don't see how we can escape from that, My Lord.

App. J. Then what was the object of enacting S.25(2) of the R.T.E. Are not offences under it all covered by the Penal Code?

D.P.P. If he actually killed a man 304A would apply. Under 336 he must actually endanger life. The difference is this. A man could be convicted under Section 25(2) even if there is no one on the road for miles. You may not go round the corner, for example, in such a dangerous manner—you would be committing an offence under that section though actually you may not have endangered any person's life or safety because there is nobody there to endanger. If there had been a person there whose safety of life would have been endangered then it would come under Section 336. I thank Your Lordships for a patient hearing.

C.J.F.M.S. You are advancing the same arguments, I think, in the other case No. 17/39.

D.P.P. Yes, with regard to the other case. I take it that Your Lordships would feel bound to give the same meaning to "negligence" throughout the Code.

C.J.F.M.S. Yes.

The judgment of the Court was as follows:—

These are appeals by the Public Prosecutor, and were heard together. Only points of law arise. The first point is whether this Court is bound by its previous decisions or not. In the Colony, the Court of Appeal appears to have considered that under exceptional circumstances they might hold that they were not bound by their previous decisions. On the other hand, the Court of Appeal in the Federated Malay States has held that they are so bound.

The case we are now asked to hold as having been wrongly decided, and not to follow, is the case of *Cheow Keok v. Public Prosecutor*[2]. As, however, we are of the opinion that that case was correctly decided, it is unnecessary for us to express any definite opinion as to whether we or future Courts of Appeal are bound to follow it or not.

In regard to whether the case above-mentioned was correctly decided or not, we would only point out that section 304A of the Penal Code has, with one exception, always previously been interpreted as we interpret it, not only in Malaya but also in India, Ceylon, and other countries in which the Indian Penal Code has been adopted.

The only reported case brought to our notice, not in accordance with our decision, is the case of *Lai Tin v. Public Prosecutor,*[9] and the judgment in that case we were, and are still, unable to agree with. It, therefore, follows that 'gross negligence' or a 'high degree of negligence' must be proved before there can be a conviction under section 304A, and the same high degree of negligence must be proved to establish a conviction under the other sections of the Penal Code which make 'negligent acts' a criminal offence, and we would only add that Mr. Hay did not attempt to argue to the contrary. As the above were the only points argued on behalf of the Public Prosecutor, Appeal No. 20 of 1939 must be dismissed.

In regard to Appeal No. 17/39 in which the following question of law was reserved for the consideration of this Court:

> "Whether negligence has the same meaning in section 338 as in section 304A of the Penal Code."

the answer must be in the affirmative, and Mr. Hay conceded that, in view of our decision in Appeal No. 20/39, such must be the answer.

As a rule, in criminal appeals, when questions of law arise, this Court gives a reserved judgment or judgments, but as the case of *Cheow Keok v. Public Prosecutor*[2] has not yet been reported, there appears to be no object in reserving our judgment. Why this case has not yet been reported appears extraordinary. It was presumably a case of some importance, and further, *Lai Tin v. Public Prosecutor,*[9] which it overruled, was reported a considerable time after our judgments in *Cheow Keok's* appeal were delivered.

Appeals dismissed.